Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Service Rules for the 698-746, 747-762 and 777-792 MHz Bands	)	WT Docket No. 06-150
	)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules	)	WT Docket No. 06-169
	)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band	)	PS Docket No. 06-229
	)	
Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010	)	WT Docket No. 96-86

COMMENTS OF AT&T INC.

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SUMMARY

The Commission has long anticipated the day when the highly-valuable 700 MHz Band spectrum could be transitioned away from analog broadcasting and used instead for innovative wireless services. With the upcoming end to the digital television transition, that day is fast approaching. This rule making proceeding and the upcoming auction of 700 MHz licenses offer the Commission a rare opportunity to promote the widespread and rapid development and deployment of wireless technologies, services and devices, while also accommodating a wide variety of potential bidders. Each of these objectives, which the Commission is directed by Section 309(j) of the Communications Act to pursue, can be advanced if the Commission chooses a workable 700 MHz band plan, continues to embrace its market-based approach, refrains from adopting unnecessary construction requirements, rejects eligibility restrictions, and implements appropriate information disclosure and package bidding procedures for the 700 MHz auction.

Band Plan. AT&T supports the Commission's proposed band plan for the Lower 700 MHz Band, and suggests that the Commission adopt a slightly modified version of one of its Upper 700 MHz Band proposals. It is critical that the Commission retain guard bands at both ends of the Upper 700 MHz Band. Because of higher power operations now permitted in the immediately adjacent Lower 700 MHz C Block, it is particularly important to keep the Upper 700 MHz A Block guard band at the lower end of the Upper 700 MHz Band. In addition, the Commission should designate two 11 MHz blocks (Blocks C and D) for licensing on a REAG and EA basis, respectively, with a 10 MHz block (Block E) licensed on a REAG basis. This configuration allows for the greatest flexibility in the auction for bidders to aggregate EA licenses with REAG licenses where additional spectrum may be desired, and represents the best vehicle for maximizing the potential use of the Upper 700 MHz Band for innovative wireless services. AT&T supports the Commission's proposal to reconfigure the public safety allocation in the 700 MHz Band to make more efficient use of that spectrum.

The Commission should not abandon its policy of relying on market forces through the auction process, and so should not adopt any proposal that would place conditions on the E Block license – for example conditions allowing only a wholesale service offering made over a network that is subject to preemptible use by public safety. Creating an effective monopoly commercial provider for public safety broadband use of the commercial 700 MHz spectrum would disserve the interests of public safety communications. The Commission should permit the market to determine the most effective manner to satisfy public safety agencies' supplemental communications needs.

Performance Requirements. As the Commission has previously determined, a "substantial service" requirement, imposed at license renewal, is the optimum performance requirement for the 700 MHz spectrum. The Commission should reject additional performance requirements, such as geography-based construction benchmarks and "keep what you use" re-licensing schemes. If the Commission decides to adopt any construction requirement, it should be population-based and not geography-based.

***Eligibility*.** Proposals to impose restrictions on the eligibility of incumbent local exchange carriers, incumbent cable operators and large wireless carriers to hold 700 MHz Band licenses run counter to long-standing Commission policy to allow market forces, and not regulation, to determine winners and losers in spectrum auctions. Excluding incumbents based on a goal of creating a new broadband competitor is inconsistent with the Commission's long-standing flexible use policy and its repeated decisions not to limit the 700 MHz spectrum to broadband use. Where auction winners are not required to offer broadband service, it makes no sense to exclude any group in order to promote competition in broadband services.

Having previously rejected eligibility restrictions for the 700 MHz Band, the Commission cannot now adopt them without a reasoned basis, which the *Ad Hoc* Public Interest Spectrum Coalition ("PISC") has not provided. PISC ignores the current vibrant broadband market, focusing instead on specious warehousing arguments that are contradicted by numerous Commission findings. The record of wireless competition demonstrates that incumbent carriers have strong incentives to develop and deploy new services such as broadband. Although that market has not yet matured, competition is driving market participants to deploy the highest possible speeds to the public at large. If one carrier does not provide the fullest array of new services, others in the market will. This market discipline along with the opportunity for additional revenue streams provide strong incentives for incumbent wireless carriers to deploy new services (including broadband services) in the 700 MHz Band.

Auction-Related Rules. The Commission should incorporate into the design of the upcoming 700 MHz auction a combinatorial (or "package") bidding design that will enable bidders to easily assemble desired geographic license combinations in the auction, thereby avoiding the delays and transaction costs involved in secondary market aggregation. The Commission can pre-determine the available package to make the system workable, but optimally, bidders should be able to aggregate regional packages in EA-licensed spectrum blocks and nationwide packages in all blocks. The Commission also should make available to all auction participants in the 700 MHz auction the same information as has been typically provided in almost all previous Commission auctions. Markets function more efficiently when maximum information is made available equally, and transparent bidding in Commission auctions has resulted in efficient outcomes. The potential harms that theoretically could flow from releasing bid and bidder information are outweighed by the benefits of a transparent, verifiable process.

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To: The Commission

COMMENTS OF AT&T INC.

AT&T Inc. ("AT&T") hereby submits comments in response to the *Further Notice of Proposed Rulemaking* in the captioned proceedings, in which the Commission is considering service and competitive bidding rules for the 698-746 MHz band (the "Lower 700 MHz Band"), and the 746-764 and 776-794 MHz bands (the "Upper 700 MHz Band") (the Lower 700 MHz Band and Upper 700 MHz Band referred to, together with the public safety allocation at 764-776 MHz, as the "700 MHz Band").[1]

[1] *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands* (WT Docket No. 06-150), *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems* (CC Docket No. 94-102), *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones* (WT Docket No. 01-309), *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services* (WT Docket No. 03-264), *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27*

I. THE COMMISSION SHOULD ADOPT A MODIFIED VERSION OF ONE OF ITS PROPOSED COMMERCIAL BAND PLANS AND ADOPT ITS PROPOSED RECONFIGURATION OF THE PUBLIC SAFETY ALLOCATION

A. The 700 MHz Commercial Band Plan

The Commission proposes to leave the Lower 700 MHz Band spectrum blocks unchanged but to alter the geographic service areas for these licenses. With respect to the Upper 700 MHz Band, the Commission sought comment on five alternative band plan proposals which offer a variety of approaches to both bandwidth and service area size.[2]

The band plan issue brings into focus the careful balancing of competing objectives that Section 309(j) of the Communications Act requires. The Commission is faced with the challenge of promoting the rapid deployment of new technologies and services in the most efficient way while also assuring wide dissemination of licenses.[3] On the one hand, the ultimate goal is to create a regulatory environment that will attract wide-scale investment, making possible the speedy introduction of new services for the American public. On the other hand, the Communications Act requires the Commission to promote economic opportunity by disseminating licenses to a wide variety of applicants. Balancing these objectives is never more difficult than in decisions on band plans.

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of the Commission's Rules (WT Docket No. 06-169), *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band* (PS Docket No. 06-229), *Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010* (WT Docket No. 96-86), *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-72 (rel. April 27, 2007) (referred to herein as the "*Report and Order*" and the "*Further NPRM*").

[2] *Further NPRM* at ¶¶ 177-206.

[3] *See* 47 U.S.C. § 309(j)(3)(A), (B).

The various band plan proposals advance different objectives to differing degrees. The optimal band plan should involve a balancing of these objectives, and also take into account interference and coordination concerns as well as the need to ensure effective public safety communications.

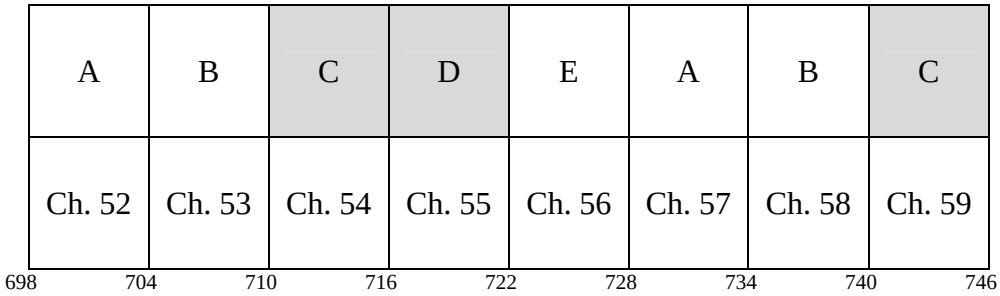
AT&T supports the Commission's proposed Lower 700 MHz band plan, which leaves the spectrum block sizes unchanged and involves a mix of geographic licensing in that portion of the band heavily favoring smaller geographic areas. For the Upper 700 MHz Band, AT&T supports the general direction suggested by Band Plan Proposals 4 and 5,[4] but urges the Commission to adopt a slightly modified version of these proposals, maintaining a mix of geographic license sizes by (1) designating the C and E Blocks for Regional Economic Area Grouping-based (REAG-based) licensing and the D Block for Economic Area-based (EA-based) licensing, and (2) retaining the Upper 700 MHz A Block guard band in its current location at the lower end of the Upper 700 MHz Band and the Upper 700 MHz B Block guard band (albeit at a reduced size – 2 MHz) in its current location at the upper end of the Upper 700 MHz Band.

Lower 700 MHz Band. These as-yet-unauctioned Lower 700 MHz Band licenses should be offered on the basis of a combination of Cellular Market Area (CMA), EA and REAG license service areas, as proposed in the *Further NPRM*. Configured in this way, and assuming the incorporation of package bidding in the auction design (as suggested in Section IV.B. below), bidders will have the ability to bid on individual licenses or to easily aggregate a larger service area footprint, and the Commission's determination to

[4] As noted below, however, AT&T does not favor adoption of the E Block proposal made by Frontline Wireless, LLC ("Frontline").

provide for a mix of geographic licensing areas will be enhanced. AT&T therefore endorses the Commission's proposed Lower 700 MHz band plan as follows:

Lower 700 MHz Band

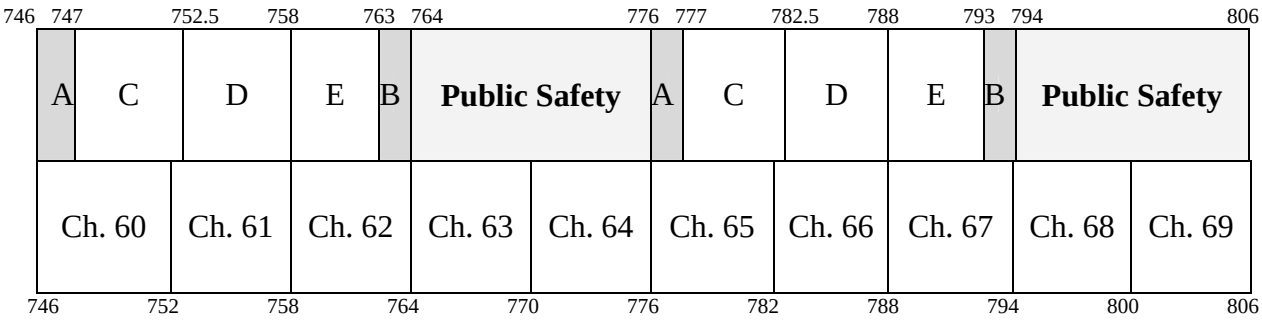


Block	Frequencies	Bandwidth	Pairing	Areas	Licenses
A	698-704, 728-734	12 MHz	2 x 6 MHz	EA	176
B	704-710, 734-740	12 MHz	2 x 6 MHz	CMA	734
C	710-716, 740-746	12 MHz	2 x 6 MHz	CMA	734*
D	716-722	6 MHz	unpaired	EAG	6*
E	722-728	6 MHz	unpaired	REAG	12

* C & D Blocks have been auctioned.

Upper 700 MHz Band. Of the five band plan proposals for the Upper 700 MHz Band set forth in the *Further NPRM*, Proposals 4 and 5 – each of which designates two 11 MHz blocks and one 10 MHz block and provides guard band protection – come closest to providing the mix of features that can best balance the competing objectives of Section 309(j). Designating two 11 MHz blocks and one 10 MHz block will provide opportunities for a wide variety of entities to use the auction process to achieve their different business plans, acquiring sufficient spectrum to offer the full panoply of innovative wireless services capable of being deployed over this spectrum. A few slight variances from the band plans shown in Proposals 4 and 5 are needed, however. It is critical, for example, that the Commission maintain guard bands at both ends of the Upper 700 MHz Band. AT&T's proposed Upper 700 MHz band plan is as follows:

Upper 700 MHz Band



Block	Frequencies	Bandwidth	Pairing	Areas	Licenses
A	746-747, 776-777	2 MHz	2 x 1 MHz	MEA	52*
B	763-764, 793-794	2 MHz	2 x 1 MHz	MEA	52*‡
C	747-752.5, 777-782.5	11 MHz	2 x 5.5 MHz	REAG	12
D	752.5-758, 782.5-788	11 MHz	2 x 5.5 MHz	EA	176
E	758-763, 788-793	10 MHz	2 x 5 MHz	REAG	12

* A & B Guard Band Blocks have been auctioned.

‡ 42 of 52 B Guard Band licenses are now held by FCC and could be included in auction; remaining licenses potentially grandfathered.

Given the disparity in allowable power between the Lower 700 MHz C Block (50 kW ERP) and the Upper 700 MHz C Block (1 kW/MHz), retention of the Upper 700 MHz A Block guard band in its current location (746-747/776-777 MHz) is necessary and appropriate to assist in shielding Upper 700 MHz C Block operations from interference from the high power operations allowed in the Lower 700 MHz Band C Block.[5] In addition, the Upper 700 MHz B Block guard band should be retained to help keep public safety operations in the 764-776/794-806 MHz band free from harmful interference from the Upper 700 MHz E Block licensee but, assuming the Commission

[5] For the same reason, it is critical that the Upper 700 MHz C Block license be allocated 11 MHz (2 x 5.5 MHz) so as to provide the licensee with the capability of utilizing an internal guard band and still have the full capability of a 5 MHz carrier.

reconfigures the Upper 700 MHz public safety allocation as proposed, the size of the B Block guard band can be reduced from the current 4 MHz to 2 MHz.[6]

AT&T supports the designation of REAG- and EA-based geographic license sizes for the as-yet-unauctioned Upper 700 MHz Band licenses with the C and E Blocks licensed on a REAG basis, and the D Block licensed on an EA basis. This configuration allows for the greatest flexibility in the auction for bidders to aggregate EA licenses with REAG licenses where additional spectrum may be desired, and represents the best vehicle for maximizing the potential use of the Upper 700 MHz Band for innovative wireless services. Aggregating Lower 700 MHz licenses with Upper 700 MHz licenses likely will be less practical and less economically viable because this would require additional radio components and functionality in the devices if both bands must be covered, thus increasing the complexity, size and cost of these devices. In this regard, opportunities for aggregation in the Upper 700 MHz Band should be maximized. Providing for a mix of REAG and EA licenses in the Upper 700 MHz Band also will minimize interference and coordination problems.[7]

The mix of REAG and EA licenses that would result from this proposal strikes an appropriate balance between the need to encourage economies of scale and scope – which will facilitate nationwide deployment of infrastructure equipment and devices – and the desire to allow prospective bidders to target their bidding to particular, more localized

[6] Forty-two of the 52 original Upper 700 MHz B Block guard band licenses (awarded in FCC Auctions 33 and 38 on a Major Economic Area (MEA) basis) have been returned to the Commission, and those licenses can be included in the upcoming 700 MHz Band auction.

[7] The Commission should also take account of the possibility that an FDD system may be deployed in the Upper 700 MHz Band by specifying the duplexing direction in such as way as to minimize interference into the public safety band. This would dictate that the upper half of the band be used for uplink (mobile station-to-base station) and the lower half of the band be used for the downlink (base station-to-mobile station transmission).

market areas. Prospective bidders whose business plans require aggregation of license areas will have a realistic opportunity to achieve those plans through the auction process, and once licensed, they will have sufficient purchasing power to drive equipment costs down – ultimately benefiting consumers. At the same time, having 176 available 11 MHz licenses in the Upper 700 MHz D Block will provide adequate opportunities for bidders whose business plans do not call for wide geographic reach to pursue more localized strategies. In addition, if the Commission adopts its proposed band plan for the Lower 700 MHz Band, the CMA-based licenses available there will provide opportunities for bidders with even more localized business plans and will fulfill the Commission's desire to provide a variety of geographic license areas.

If the band plan ultimately adopted by the Commission for the 700 MHz Auction fails to produce an optimal market structure for the nationwide deployment of new advanced wireless services, the market will be forced to adjust through secondary market transactions, but precious time and resources will be lost in that process. It would be far better to create the optimal band plan as an initial matter to reduce the need for secondary market transactions to produce the desired result. Adoption of AT&T's alternative proposal will best achieve this objective.

Allow Marketplace Forces to Dictate Services. Whatever band plan is ultimately adopted, it is important that the marketplace, and not regulation, determine the uses to which 700 MHz Band licenses are put. Suggestions that the Commission place "open access" conditions on licenses in the 700 MHz Band should be rejected.[8] The Commission has recently launched multiple broadband inquiries aimed at "enhancing our

[8] See *Ex Parte* Comments of the *Ad Hoc* Public Interest Spectrum Coalition in WT Docket No. 06-150, *et al.* (submitted April 5, 2007), at 7-10.

understanding of the nature of the market for broadband and related services."[9] Having not yet completed the information-gathering process initiated in that inquiry, it is premature for the Commission to conclude that open access requirements are needed in the 700 MHz Band.

The Commission has already made clear that its policy is to maintain technical and service neutrality, leaving those decisions to licensees and market forces. In its *Upper 700 MHz Service Rules Order* the Commission said that it would "allow licensees to make determinations respecting the services provided and technologies to be used."[10] The Commission wisely recognized that leaving such decisions to the licensee would allow the market to determine "the band's suitability for uses ranging from wideband mobile communications to innovative, fixed wireless Internet access services and new broadcast-type services."[11] The advocates of "open access," however, are seeking to replace market forces with regulation, requiring that commercial 700 MHz licenses be used to offer only standardized, completely unbundled broadband Internet access.

Open access conditions also are a key component of the band plan proposed by Frontline.[12] Although labeled as the "Public Safety Deployment Plan," Frontline's proposal is not necessary to create a nationwide, broadband, interoperable public safety

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[9] *Broadband Industry Practices*, WC Docket No. 07-52, *Notice of Inquiry*, FCC 07-31 (released April 16, 2007); *see also* Skype Communications S.A.R.L., Petition to Confirm a Consumer's Right to use Internet Software and Attach Devices to Wireless Networks, RM-11361 (filed Feb. 20, 2007); Public Notice, "Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemakings Filed," Report No. 2807 (CGB rel Feb. 28, 2007).

[10] *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476, 483 ¶ 15 (2000) ("*Upper 700 MHz Service Rules Order*").

[11] *Id.* at 485 ¶ 18 (footnote omitted).

[12] *See Further NPRM* at ¶¶ 268-90.

network. As demonstrated in response to the *Ninth NPRM*, public safety has adequate spectrum at the present time.[13] Adoption of the Commission's plan to redesignate 12 MHz of the public safety allocation in the 700 MHz Band for use by a single, nationwide, interoperable, broadband public safety network[14] would help solve interoperability concerns and satisfy public safety demand for broadband communication capabilities.[15] Further, mandating public safety access to the E block would be inconsistent with the Commission's determination that additional spectrum should not be made available until "existing [public safety] spectrum allocations in the 700 MHz, 800 MHz, and 4.9 GHz bands are fully deployed and initiatives to make more efficient use of existing spectrum are completed."[16]

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[13] *See, e.g.*, AT&T Comments in PS Docket No. 06-229 at 7-14 (filed Feb. 26, 2007); Jon M. Peha, Professor of Electrical Engineering and Public Policy, Associate Director of the Center for Wireless and Broadband Networking, Carnegie Mellon University, *How America's Fragmented Approach to Public Safety Wastes Money and Spectrum*, Abstract presented at 33rd Telecommunications Policy Research Conference, at 13-14 (Sept. 2005) (finding that, given current technologies, public safety communications needs could be *satisfied through 2010 with an allocation of only 8.3 MHz*); Peter Cramton, Thomas S. Dombrowsky, Jr., Jeffrey A. Eisenach, Allan Ingraham, and Hal J. Singer, "Improving Public Safety Communications: An Analysis of Alternative Approaches," Criterion Economics, L.L.C. at 29 (Feb. 6, 2007).

[14] *See Further NPRM* at ¶ 250; *see also Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, PS Docket No. 06-229, *Ninth Notice of Proposed Rulemaking*, FCC 06-181 (rel. Dec. 20, 2006) ("*Ninth NPRM*").

[15] Recent public safety efforts to establish broadband networks also demonstrate that 10 MHz should be more than sufficient to create a national broadband network. Northrop Grumman was awarded a contract to build a broadband wireless public safety network for New York City over 10 MHz of spectrum utilizing UMTS technology. *See* Press Release, Northrop Grumman Information Technology, "Northrop Grumman Wins $500 Million New York City Broadband Mobile Wireless Contract," (Sept. 12, 2006). Similarly, the National Capital Region was recently granted a waiver to build a similar network to serve the Washington, D.C. area by utilizing two 1.25 MHz channels, a total of only 2.5 MHz of spectrum. *See Request of National Capital Region for Waiver of the Commission's Rules to Allow Establishment of a 700 MHz Interoperable Broadband Data Network*, WT Docket No. 96-86, *Order*, DA 07-454 (rel. Jan. 31, 2007).

[16] *See Report to Congress on the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State, and Location Emergency Response Providers — Submitted Pursuant to Public Law No. 108-458*, DOC-262865, 14 FCC Rcd 7772, ¶ 98 (2005).

As recently noted in the *Wall Street Journal*, Frontline's proposal contains burdensome conditions designed to "scare off auction competition and increase the chances of Frontline grabbing the licenses for a song."[17] The adoption of this proposal would violate the principle of allowing market forces, rather than regulation, to shape the development of wireless services – a principle to which the Commission has long adhered.[18] Commission policies should encourage carriers to develop a variety of competing business plans with market forces determining which plans will be successful.[19] In contrast, if Frontline's proposal is adopted, the market would not determine the "winning" business model for the E Block; rather Commission regulations would require all bidders for this block to adopt the Frontline business model. This would be especially troubling because it (i) would effectively create a monopoly provider

[17] Editorial, *The Spectrum Game*, Wall St. J., Apr. 17, 2007, at A18.

[18] *See Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket No. 99-168 , *Third Report and Order*, 16 FCC Rcd 2703, ¶ 42 (2001); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 F.C.C.R. 9462, 9477 (1996); FCC Strategic Plan – 2006-2011 at 8 (Competition Policy, Objective 1), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf.; *Spectrum Reallocation Policy Statement*, 14 FCC Rcd 19871-72; *see also* Separate Statement of Chairman Kevin J. Martin, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eleventh Report, 21 FCC Rcd 10947 (2006) (noting that "a competitive marketplace – rather than economic regulation – provides the greatest benefits to the American consumer"). *Accord* Gregory L. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87, 94-95 (1997)("Market-Based Spectrum Policy").

[19] *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, *Report and Order*, 18 FCC Rcd 25162 (2003) (noting that carriers should be entitled "to tailor their acquisition of spectrum . . . to meet their individual business plans" and that "market forces rather than the Commission [will] ultimately determine how this spectrum is licensed"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Fourth Report and Order*, 16 FCC Rcd 15435, ¶7 (2001); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Fourth Report and Order*, 16 FCC Rcd 15435 ¶7 (2001).

for public safety communications needs,[20] and (ii) would be premised on adoption of the carrier's carrier approach pioneered, albeit unsuccessfully, by NextWave.

Rather than create this effective monopoly, the Commission should permit the market to determine the most cost-effective manner to satisfy the supplemental communications needs of public safety. Certain models exist today. For example, priority access is already available from numerous carriers. Moreover, AT&T and other wireless carriers have already developed a suite of broadband applications designed to accommodate public safety needs. On May 2, 2006, at Rash Field in the Inner Harbor of Baltimore, Maryland, AT&T participated in a demonstration of the wide variety of public safety/national security applications possible over commercial UMTS/HSDPA networks via a commercial IP multimedia subsystem ("IMS").[21] As such, these solutions provide a much more timely and efficient path towards public safety interoperability.[22]

Furthermore, establishing three blocks of spectrum in the Upper 700 MHz Band (11 MHz C block, 11 MHz D block and 10 MHz E block) in accordance with AT&T's proposed band plan establishes a dynamic spectrum platform and creates a competitive marketplace from which public safety agencies can take advantage of innovations, evolutions and economies of scale. In a competitive environment, these agencies will

[20] Frontline proposes the establishment of a single network that would operate on both public safety and commercial spectrum in the 700 MHz band and would entitle public safety entities to utilize the commercial portion of the network in emergency situations. This may lock public safety into using the proposed E block for any supplemental communications needs, and in turn, might enable the E block licensee to charge public safety a premium to access the commercial network.

[21] IMS permits the sharing of different media during a single transmission — *i.e.*, numerous applications such as voice communications, video feeds, and file transfers can be utilized simultaneously.

[22] Frontline proposes a seven year build-out period to construct a network covering 95 percent of the U.S. population (with 98 percent coverage at the ten-year mark). Given the history to date of the 800 MHz public safety re-banding process, as well as Frontline's admission that "there are a great many details to work out" (*see* Frontline *Ex Parte*, Mar, 26, 2007, at 3), it likely will take much longer than seven years to build a network serving a substantial portion of the country.

have options. In contrast, the Frontline proposal offers public safety a "single provider" model in which guideposts for build-out of their networks will not even be established before the E block licensee is determined.

Given the spectrum currently available for public safety and the capabilities available for supplemental public safety communications needs by partnering with commercial licensees, there is no need to dedicate the Upper 700 MHz E Block for supplemental public safety communications needs on a monopoly basis. Moreover, as the Commission has recognized, by doing so "the amount of spectrum to be auctioned for commercial services pursuant to flexible service and technical rules in the Upper and Lower 700 MHz Band would decrease by ten megahertz, from 60 to 50 megahertz."[23]

Reliance on market forces to determine the appropriate use of the commercial 700 MHz spectrum is especially appropriate when weighed against the uncertain nature of the Frontline plan. Frontline proposes to build a complex dual-use network with enormous construction requirements. This translates into capital expenditures currently estimated by Frontline itself to be $10-15 billion.[24] The business model for funding this network is untested. The revenue from wholesale commercial operations is far from certain and the introduction of an intermediate layer between the customer and the carrier will result in higher prices for consumers as investors in each layer require a return on their investments. Some analysts have concluded that a carrier's carrier approach is no longer viable[25] — and it is even less clear whether a commercial success can be made from

[23] *Further NPRM* at ¶ 279.

[24] Frontline *Ex Parte*, Mar, 26, 2007, at 2.

[25] *See* http://telephonyonline.com/mag/telecom_court_rules_money (quoting Ira Brodsky, president of Datacomm Research).

selling *preemptible* wholesale communications capacity. But if indeed there is demand for a wholesale broadband service provider, the Commission should trust a free and open auction process – and the marketplace forces it unleashes – to uncover it.

If the Commission ultimately decides to set aside the Upper 700 MHz E block as proposed by Frontline, bidders should be afforded greater clarity regarding the network design requirements they have to meet.[26] Any such decision should therefore include specification of the primary terms and conditions that would have to be part of a Network Services Agreement to be negotiated between the E block winner and the national broadband public safety licensee, as well as penalties or sanctions to be imposed for failure to meet these terms and conditions. Anything less will preclude potential bidders from making reasoned judgments on the value of this spectrum in the auction.

B. The 700 MHz Public Safety Band Plan

In the *Further NPRM*, building on the record developed in the guard band and public safety dockets,[27] the Commission tentatively concluded that it should consolidate the existing 12 MHz of narrowband channels to the upper half of the 700 MHz Band public safety allocation, designate the lower half of the block for broadband operations

[26] *See* Comments of GEOCommand, Inc. in the instant proceeding, May 22, 2007, at 6-11.

[27] *See Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket Nos. 06-169 and 96-86, *Notice of Proposed Rule Making*, 21 FCC Rcd 10413 (2006) ("*700 MHz Guard Bands Notice*"); *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, PS Docket No. 06-229, WT Docket No. 96-86, *Ninth Notice of Proposed Rulemaking*, 21 FCC Rcd 14837 (2006) ("*700 MHz Public Safety Ninth Notice*"); *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, WT Docket No. 96-86, *Eighth Notice of Proposed Rulemaking*, 21 FCC Rcd 3668 (2006) ("*700 MHz Public Safety Eighth Notice*").

(assuming adoption of the broadband approach), and create a 1 MHz internal guard band at the top of the broadband allocation to prevent interference.[28]

The proposed approach to the public safety allocation preserves the amount of narrowband spectrum available, and increases the amount of public safety spectrum usable for broadband technologies to an amount sufficient to accommodate public safety agencies. This proposal also would improve spectrum efficiency by eliminating one of the internal public safety guard bands under the current band plan, and would reduce the amount of intermodulation interference into the narrowband public safety receivers by increasing the separation between narrowband public safety spectrum and commercial spectrum.[29]

II. THE COMMISSION SHOULD RELY EXCLUSIVELY ON ITS SUBSTANTIAL SERVICE STANDARD AND SHOULD NOT IMPOSE GEOGRAPHY-BASED BUILD-OUT REQUIREMENTS OR A "KEEP-WHAT-YOU-USE" RE-LICENSING SCHEME

A. A Substantial Service Requirement for the 700 MHz Band Is Consistent with the Commission's Well-Established Policy Favoring Reliance on Market Forces

When it established service rules for the 700 MHz spectrum, the Commission adopted a license renewal requirement that each 700 MHz commercial licensee provide "substantial service" to its service area,[30] and clarified that substantial service requires build-out in rural areas:

> [A] licensee that builds out to urban areas and areas with high density population, will not necessarily be assured of license renewal, even if otherwise compliant with the construction benchmarks. We believe that

[28] *See Further NPRM* at ¶ 257.

[29] See Comments of AT&T Inc. in WT Docket No. 06-229, Feb. 26, 2007, at 14-16.

[30] *See Upper 700 MHz Service Rules Order*, 15 FCC Rcd at 505-506 ¶¶ 70-72, and *Lower 700 MHz Service Rules Order*, 17 FCC Rcd at 1079 ¶¶ 149-151.

> the "substantial service" standard requires the licensee to buildout in rural areas as well.[31]

The Commission also outlined certain other "safe harbors" that would demonstrate substantial service in the 700 MHz Band,[32] and concluded that the substantial service requirement, together with the service rules and the Commission's other competition policies, "constitute effective safeguards and performance requirements for licensing this spectrum."[33]

In assessing generally the best means to promote delivery of services to rural areas, the Commission afforded licensees in numerous services the option of satisfying their construction requirements by providing substantial service, finding that the substantial service standard provides licensees with greater flexibility to serve rural areas.[34] The Commission has adopted a safe harbor that deems the substantial service requirement satisfied if the licensee "provides coverage to at least 75 percent of the geographic area of at least 20 percent of the 'rural areas' within its licensed area."[35]

Consistent with the Commission's general rural service policy, the existing 700 MHz substantial service requirement will promote service to rural areas and does not need to be modified. Significantly, the Commission reserved the right to review the 700 MHz requirements "if we receive complaints related to Section 309(j)(4)(B), or if a

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[31] *Upper 700 MHz Service Rules Order*, 15 FCC Rcd at 505 ¶ 71.

[32] *Id*.

[33] *Id*. at ¶ 72.

[34] *See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19078, 19119-23 (2004) ("*Rural Order*").

[35] *Rural Order*, 19 FCC Rcd at 19123 ¶ 79..

reassessment is warranted because spectrum is being warehoused or is otherwise not being used despite demand . . . [or] in the event that actual anticompetitive or universal service problems develop."[36] The Commission has had round after round of comment on whether alternative build-out rules are needed to promote access to spectrum, but nothing has changed since the initial decision to use the substantial service standard.

The Commission's current proposal in the *Further NPRM* to impose geography-based construction benchmarks on 700 MHz Band commercial licensees is therefore unnecessary, would constitute an abrupt departure in position and an abandonment of a key principle that has guided Commission policy-making for years: that the public interest is generally better served by the operation of market forces than by regulation.[37] This principle is still central to the Commission's competition policy, which places "primary reliance on market forces to stimulate competition, technical innovation, and development of new services for the benefit of consumers."[38] Requiring 700 MHz commercial licensees to meet required geography-based construction benchmarks would disregard market forces without any demonstration of market failure. Furthermore, imposing geography-based construction requirements could significantly discourage auction participation.

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[36] *Upper 700 MHz Service Rules Order*, 15 FCC Rcd at 506 ¶ 72.

[37] *See Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . .") (footnote omitted).

[38] FCC Strategic Plan – 2006-2011 at 8 (Competition Policy, Objective 1), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf.

The Commission has concluded that substantial service requirements for the 700 MHz Band, applied at the time of license renewal, will work to promote build-out to rural areas, and the record offers no basis for changing this conclusion.

B. Neither Geography-based Construction Requirements Nor a "Keep What You Use" Re-licensing Regime Will Advance The Commission's Rural Service Goals

Imposing geography-based construction benchmarks in the 700 MHz Band will force each licensee to make investment decisions based on a need to meet an arbitrary regulatory benchmark, rather than on its individualized assessment of the needs of a particular market. Licensees will inevitably in some cases be led to make uneconomic investments, diverting capital from other uses that could produce greater consumer gain.

Furthermore, under the Commission's proposed geography-based construction benchmarks, licensees would have an incentive, in order to satisfy the arbitrary coverage requirement and thus retain geographic license area, to deploy low-cost, low-grade networks rather than invest their capital in providing advanced wireless services where sufficient market demand warrants it. In such a case, the benchmark will fail to achieve the Commission's goal of accelerated deployment of new advanced wireless services in rural areas. Regulatory intervention will not be effective in meeting this goal. Market forces should drive wireless network configurations, not government fiat.

Similarly, a "keep what you use" re-licensing approach would be inconsistent with the Commission's long-standing policy of relying on the marketplace, rather than regulation, to accomplish its objectives.[39] Again, there is no evidence of a market failure

[39] *See, e.g., Telephone Company-Cable Television Cross-Ownership Rules*, CC Docket No. 87-266, *Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 FCC Rcd 300, 305 (1991) (noting that "Market demand, rather than governmental edict, should stimulate the construction and use of advanced telecommunications networks, including broadband networks");

that would warrant the imposition of any "keep what you use" regime. Further, in order to protect against the loss of spectrum, a "keep what you use" approach actually encourages build-out in urban areas rather than rural areas and is thus inconsistent with the FCC's desire to stimulate service in rural areas.

The imposition of "keep what you use" re-licensing would ignore the marketplace realities in rural areas. Instead of leading to quicker build-out by a subsequent licensee, "keep what you use" re-licensing may actually delay ultimate build-out by removing hard-to-serve territories from the service area of the licensee, who will have greater incentives and resources than anyone else to construct facilities in those territories if economic conditions warrant. In addition, the Commission allows licensees to partition and disaggregate spectrum licenses precisely to enable market forces to work. Existing licensees will be able to make spectrum in unserved areas available to other entities more quickly and efficiently through secondary market transactions (leases or partitioning) than the Commission can through re-licensing.[40]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Report and Order*, 18 FCC Rcd 20604, 20607 (2003)(noting that spectrum leasing policies should "continue our evolution toward greater reliance on the marketplace"); *2002 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13828 (2003); *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6687 (2002); *Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898, 19902 (1999); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10036 (1999); *see also* 47 U.S.C. §§ 160, 161.

[40] *See* Comments of AT&T Wireless Services, Inc. in WT Docket No. 02-381, Dec. 29, 2003, at 4 (noting that in one year, the company had entered into partitioning and/or disaggregation agreements involving the sale of more than 100 separate market areas or portions of market areas in more than twenty states, the vast majority of which were rural and suburban counties, rural service areas, and sparsely populated areas).

"Keep what you use" also would distort investment incentives, shifting finite investment capital into markets where it is not justified. The result would be artificially low investment levels in markets with growing demand, while unjustifiable construction costs to satisfy a regulatory edict will need to be recovered through higher prices for consumers.

Finally, "keep what you use" would have a chilling effect on the development of secondary markets. Re-licensing would interfere with natural market forces by creating an incentive for prospective lessees or purchasers to wait for spectrum rather than seek it out in secondary markets. Instead of leasing or purchasing spectrum earlier, many parties may opt to wait and see if the spectrum becomes available less expensively at a later date. These flaws, along with those previously identified in the Rural Docket, outweigh any perceived benefits from re-licensing.

C. Any Construction Benchmarks Adopted Should Be Population-Based, and Should Allow for Exemption from "Keep What You Use" Re-Licensing

If the Commission ultimately decides to adopt a build-out requirement in addition to the substantial service standard applied at license renewal, it should follow the example of the Personal Communications Services (PCS) construction requirements and base the 700 MHz rules on coverage of specified amounts of the population in particular service areas. Any such requirement should track the rules applicable to 30 MHz PCS licensees, who were required to provide coverage to 33-1/3 percent of the population residing in their license areas within five years from license grant, and to 66-2/3 percent of the license area population within ten years.[41]

[41] If the Commission chooses this route for 700 MHz licenses, the applicable commencement date for the construction period should be the clearing date for the 700 MHz spectrum (*i.e.*, February 17, 2009).

Additionally, if a 700 MHz Band licensee meets these applicable construction requirements, it should be exempted from any "keep what you use" regime that the Commission may adopt. As stated above, the existing 700 MHz commercial licensees will have the greatest incentive to deploy service to more remote areas adjacent to their operations. It would be counter-productive for the Commission to withdraw territory from a licensee who has met the required construction benchmarks.

Finally, if the Commission adopts geography-based construction requirements and/or a "keep what you use" regime, it should adopt its proposal to allow 700 MHz licensees to meet their build-out benchmarks by employing a signal level sufficient to provide service to the relevant percentage of land in the service area that is not owned or leased by government.

III. THE COMMISSION SHOULD NOT RESTRICT THE ELIGIBILITY OF INCUMBENTS TO BID ON 700 MHZ LICENSES OR TO ACQUIRE THEM IN THE SECONDARY MARKET

In the *Further NPRM*, the Commission seeks comment on a proposal advanced by the *Ad Hoc* Public Interest Spectrum Coalition ("PISC") which would exclude incumbent local exchange carriers ("ILECs"), incumbent cable operators and large wireless carriers from eligibility to bid on or to acquire in the secondary market commercial licenses in the 700 MHz Band.[42] The eligibility ban, which is proposed ostensibly to ensure the emergence of a new broadband competitor, is based on unfounded assumptions as well as mistaken facts. Proposing such a ban requires ignoring the competitive realities of the

[42] *See Further NPRM* at ¶ 221; *see also Ex Parte* Comments of the *Ad Hoc* Public Interest Spectrum Coalition, filed April 3, 2007 in WT Docket No. 06-150, PS Docket No. 06-229, WT Docket No. 05-211 and WT Docket No. 96-86 ("PISC Comments").

marketplace. As demonstrated below, the adoption of any eligibility limiting measures would be both contrary to sound public policy and legally problematic.

A. Restrictions on Incumbent Eligibility are Inconsistent with a Market-Oriented Auction

The adoption of incumbent eligibility restrictions would be inconsistent with the Commission's long-standing policy of allowing market forces, rather than regulation, to shape the development of wireless services.[43] Since obtaining authority to conduct auctions in 1993, the Commission has held to the view that a competitive bidding regime, in which bidders value licenses and make bidding decisions on the basis of marketplace forces, is most likely to achieve the agency's ultimate goal – awarding licenses to those entities most likely to put them to the highest and best use. Under this approach, carriers

[43] *See Service Rules for the 746-764 and 776-794 MHz Bands*, WT Docket No. 99-168 , *Third Report and Order*, 16 FCC Rcd 2703, ¶ 42 (2001); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 F.C.C.R. 9462, 9477 (1996); FCC Strategic Plan – 2006-2011 at 8 (Competition Policy, Objective 1), available at http:// hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf.; *Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, Policy Statement*, 14 FCC Rcd 19868, 19871-72 (1999) ("*Spectrum Reallocation Policy Statement*"); *see also* Separate Statement of Chairman Kevin J. Martin, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eleventh Report, 21 FCC Rcd 10947 (2006) (noting that "a competitive marketplace – rather than economic regulation – provides the greatest benefits to the American consumer"); Separate Statement of Commissioner Kevin J. Martin, *Application of EchoStar Communications Corporation*, CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd 20559 (2002) (stating that "Generally, I believe market forces are the most effective means of delivering choice, innovation, and affordability to consumers"). *Accord* Gregory L. Rosston & Jeffrey S. Steinberg, Using Market-Based Spectrum Policy to Promote the Public Interest, 50 Fed. Comm. L.J. 87, 94-95 (1997).

with a variety of competing business plans vie for spectrum rights at auction.[44] The marketplace, rather than regulation, determines winners and losers.[45]

This policy of relying on market forces, rather than regulation, to allocate spectrum is particularly well-suited to today's wireless marketplace, where multiple carriers with varying business plans and strategies are engaged in head-to-head competition to provide a range of services, including "a wide variety of mobile data services and applications."[46] The expansion of wireless services and the meteoric rise in wireless subscribership and minutes-of-use, as well as the dramatic decline in prices per minute of use, are well-documented, and the wireless industry is universally recognized as the most competitive sector of the telecommunications industry. Today, more than 150 providers compete in an industry characterized by "falling prices, dramatic improvements in service quality, and the ongoing development of new services."[47] In this environment, market-oriented policies have been and continue to be the best way to promote innovation, investment and high-quality services at affordable prices.

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[44] *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, *Report and Order*, 18 FCC Rcd 25162 (2003) (noting that carriers should be entitled "to tailor their acquisition of spectrum . . . to meet their individual business plans" and that "market forces rather than the Commission [will] ultimately determine how this spectrum is licensed"); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Fourth Report and Order*, 16 FCC Rcd 15435, ¶7 (2001); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Fourth Report and Order*, 16 FCC Rcd 15435, ¶7 (2001).

[45] *Application of EchoStar Communications Corporation*, CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd 20559, ¶ 215 (2002) (noting that "it is not the Commission's role to pick winners and losers in competitive markets").

[46] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 06-17, *Eleventh Report*, 21 FCC Rcd 10947 ¶ 136 (2006) ("*Eleventh Competition Report*").

[47] Comments of CTIA – The Wireless Association in WT Docket No. 07-71, May 7, 2007, at 10-12.

Eligibility restrictions, in contrast, create a category of losers even before the auction commences. Those subject to the restrictions are unable to participate, even if they could make better use of the spectrum. The restrictions thereby artificially constrain the uses to which the spectrum might be put, distort its valuation and deny consumers the efficiencies that would result from a true competitive bidding process.

In addition, extending any incumbent eligibility restrictions to the secondary market would serve only to exacerbate the inefficiencies inherent in such restrictions. If auction winners are unable to economically establish a market presence or if, having done so, are unable to become viable competitors, it would do no good to prevent them from selling their licenses to entities that have existing infrastructures and know-how to deploy successful new services.

B. The Commission's Decisions Not to Adopt a Use Restriction or a DE Set-Aside Make An Incumbent Eligibility Ban Unsupportable

PISC argues for a full eligibility ban on ILECs, incumbent cable operators and large wireless carriers under the theory that the 700 MHz auction represents "the best opportunity to introduce a new broadband provider."[48] As explained below, this proposal is not only unnecessary, but is also unsupportable given the Commission's decisions not to adopt (1) a broadband (or in fact any) use restriction on the 700 MHz spectrum, and (2) a DE set aside. In the latter case, the decision was based on a finding that the widest possible array of auction participants was most likely to spur the development and deployment of high speed services.[49]

[48] PISC Comments at 17.

[49] *See Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (an agency must articulate a "satisfactory explanation for its action including a 'rational connection

In the Upper 700 MHz Band, the Commission adopted service rules that allowed for flexible use "oriented toward fulfilling the need for a variety of wireless services," and "not structured to establish particular service configurations"[50] in furtherance of the policies of greater efficiency and flexibility set forth in the *Spectrum Reallocation Policy Statement*. The Commission recognized that this spectrum was suitable for "uses ranging from wideband mobile communications to innovative, fixed wireless Internet access services and new broadcast-type services,"[51] and decided to "allow licensees to make determinations respecting the services provided and technologies to be used."[52] Likewise, when it adopted service rules for the Lower 700 MHz Band, the Commission again made the finding that, consistent with the *Spectrum Allocation Policy Statement*, a flexible allocation "can promote efficient spectrum markets, which, in turn, encourages efficient use of the spectrum."[53]

Given that the Commission has already twice decided against restricting the use of 700 MHz spectrum to any particular use, an eligibility ban based exclusively on an assumed broadband use by auction winners is a *nonsequitur*. Where auction winners are

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between the facts found and the choice made.') (*quoting Burlington Truck Lines, v. United States,* 371 U.S. 156, 168 (1962)).

[50] *Upper 700 MHz Service Rules Order*, 15 FCC Rcd at 483 ¶ 15.

[51] *Id*. at ¶ 18.

[52] *Id.* at ¶ 15.

[53] *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, GN Docket No. 01-74, Report and Order, 17 FCC Rcd 1022, 1029 ¶ 13 (2002) ("*Lower 700 MHz Service Rules Order*"), *citing Spectrum Reallocation Policy Statement* at ¶ 9. The Commission also made the determinations regarding flexible use required by Section 303(y) of the Act for both the Upper and Lower 700 MHz Bands. 47 U.S.C. § 303(y) (requiring the Commission, before permitting flexible use as part of its allocations process, to determine that such flexibility (1) is consistent with international agreements; (2) would be in the public interest; (3) would not deter investment in communications services or systems, or technology development; and (4) would not result in harmful interference among users).

not required to offer broadband service, it makes no sense to exclude a group of incumbent wireless providers under the theory that such exclusion will promote competition in broadband services. This illogic is compounded by excluding entities that are fully capable of providing broadband service.

Broadband may evolve to be the predominant use of the 700 MHz Band, but the FCC has already decided that it will rely on market forces to determine the services to be offered. What follows from this decision is the broadest possible eligibility and an auction process that determines the highest and best use – not exclusions of major stakeholders to protect one possible use of the spectrum. The *Further NPRM* does not reopen the issue of whether the Commission's "flexible use" policy should apply to the 700 MHz Band. Indeed, in the *Further NPRM*'s discussion of the Frontline proposal, the Commission reaffirms the applicability of its flexible use policy to this spectrum by making reference to the fact that the spectrum to be auctioned for commercial services will be "pursuant to flexible service and technical rules . . . ."[54]

In addition, the Commission decided in this proceeding not to adopt eligibility restrictions to ensure that "designated entities" ("DEs") acquire 700 MHz licenses because doing so

> risks denying the licenses to other applicants that may be more likely to use them effectively or efficiently for the benefit of consumers. Potentially excluding such applicants could compromise the Commission's pursuit of various statutory objectives including promoting *the development and deployment of new technologies, products, and services for the benefit of the public and promoting efficient and intensive use of the spectrum*.[55]

[54] *Further NPRM* at ¶ 279.

[55] *Report and Order* at ¶ 63 (emphasis added), *citing* 47 U.S.C. § 309(j)(3).

Having decided that a DE set-aside restricting eligibility may very well compromise the development and deployment of new services, it would be inconsistent for the Commission to suddenly adopt a different eligibility restriction – one imposed on entities highly capable of furthering this goal.

In short, restricting incumbent eligibility in an effort to promote broadband use of the 700 MHz spectrum is irreconcilable with the rationale given in prior Commission decisions on use restrictions and a DE set aside. This conflict make any eligibility restriction legally suspect.

C. The Record Does Not Support Imposition of Any Incumbent Eligibility Restriction

1. No record basis has been provided by PISC to support a reversal of the Commission's "open eligibility" determination for the 700 MHz Band

When it adopted commercial service rules for both the Upper 700 MHz Band and the Lower 700 MHz Band, the Commission considered whether to impose restrictions on eligibility to hold licenses. In each case, the Commission decided not to impose any eligibility restriction. Any Commission action limiting incumbent eligibility for 700 MHz licenses thus would amount to a complete reversal in position, something it cannot do casually without a reasoned basis grounded in the record.[56] PISC has not provided,

[56] *See id*. at 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis."); *see also National Conservative Political Action Comm. v. Federal Election Comm'n*, 626 F.2d 953, 959 (D.C. Cir. 1980) ("Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures"); *Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . .") (footnote omitted); *Office of Communication of the United Church of Christ v Federal Communications Comm'n*, 707 F.2d 1413 (D.C. Cir. 1983) ("abrupt shifts in policy do constitute 'danger signals'").

and in light of the actual record of wireless competition, could not provide a factual basis for the Commission to change positions from its original open eligibility conclusion.

In adopting rules for the Upper 700 MHz Band, the Commission stated that:

> no prospective licensee will be barred from participation in the auction or from post-auction acquisition of a license for this spectrum based on its status as a provider of cable services, for example, or of telephone or other telecommunications services. We believe that opening this spectrum to as wide a range of applicants as possible will encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the most efficient use of the spectrum.[57]

Two years later, when the Commission considered service rules for the Lower 700 MHz Band, it repeated its view that "open eligibility will enhance the opportunities for licensees to provide service in any market or combination of markets" and that "[a] policy of open eligibility for the Lower 700 MHz Band will best serve the public interest . . . ."[58]

The Commission re-confirmed the philosophy underpinning its 700 MHz decision when it stated in the Advanced Wireless Services proceeding that:

> [i]n recent years the Commission has determined in a number of services that eligibility restrictions on licenses may be imposed only when open eligibility would pose a significant likelihood of substantial harm to competition in specific markets and when an eligibility restriction would be effective in eliminating that harm. Under this approach we rely on market forces to guide license assignment absent a compelling showing that regulatory intervention to exclude potential participants is necessary.[59]

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[57] *Upper 700 MHz Service Rules Order*, 15 FCC Rcd at 497 ¶ 49 (footnote omitted).

[58] *Lower 700 MHz Service Rules Order*, 17 FCC Rcd at 1074 ¶ 134 (footnote omitted).

[59] *See Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands* (WT Docket No. 04-365); *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands* (WT Docket No. 02-353), *Notice of Proposed Rule Making*, 19 FCC Rcd 19623, 19291 ¶ 69 (2004) (footnote omitted).

There is no evidence of any likelihood – much less a "significant likelihood" – that open eligibility would cause any harm – much less "substantial harm" – to competition in specific markets, and thus no reason to change course.

PISC does not dispute that incumbent wireless carriers are vigorously competing with one another to roll-out faster broadband services to the public and it also neglects the history of vigorous competition in the market for wireless voice services.[60] Instead, PISC relies on an academic's theories, unsupported by any evidence, to make specious warehousing claims.[61] As shown below, however, the purported examples of warehousing on which these theories are based are nothing of the sort:

- In granting a requested extension of the Wireless Communications Services (WCS) "substantial service" requirement, the Wireless Telecommunications Bureau found that WCS licensees "face factors beyond their control that have limited their options in providing service."[62] Indeed, the Bureau found that equipment was not yet available to provide viable service.

- In assessing the potential competitive impact of the proposed AT&T/BellSouth merger, the Commission considered the arguments regarding Broadband Radio Service (BRS) spectrum made by merger opponents (restated in the *Wilkie Paper*) and concluded that the proposed merger was "unlikely" to have an effect on "the mobile data services market,

[60] *See* Section II.C.2 *infra*.

[61] *See* Simon Wilkie, *Spectrum Auctions Are Not a Panacea: Theory and Evidence of Anti-Competitive and Rent-Seeking Behavior in FCC Rulemakings and Auction Design*, Attachment A to *Ex Parte* Comments of the *Ad Hoc* Public Interest Spectrum Coalition, filed in WT Docket No. 06-150 *et al*. on April 3, 2007 (originally submitted in WT Docket No. 07-16 on March 26, 2007), at 20-31 ("*Wilkie Paper*"). The *Wilkie Paper* was prepared on behalf of M2Z Networks in support of that company's attempt to avoid an auction and be awarded a nationwide license for spectrum in the 2155-2175 MHz block.

[62] *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses Request of WCS Wireless, LLC for Limited Waiver of Construction Deadline for 16 WCS Licenses Request of Cellutec, Inc. for Limited Waiver of Construction Deadlines for Stations KNLB242 and KNLB216 in Guam/Northern Mariana and American Samoa*, WT Docket No. 06-102, *Order*, 21 FCC Rcd 14134 ¶ 9 (WTB 2006).

the fixed broadband services market, or the merged entity's incentive and/or ability to 'warehouse' spectrum."[63]

- With respect to Multichannel Video Distribution and Data Service (MVDDS), the *Wilkie Paper* states that "there is no evidence in the record to indicate that [any auction winner] has made any effort to build network facilities,"[64] but the build-out deadline for these licenses is more than two years away.

- The *Wilkie Paper* incorrectly states that the LMDS bands were "reserved" to provide "services that would directly compete with DSL, cable-modem and other fixed broadband access technologies provided by incumbent telecommunications carriers and cable operators, among others."[65] In fact, the Commission first expected LMDS licensees to offer wireless last mile competition in the local telephony market and potential competition to cable television in the multichannel video program distribution market.[66] The business model envisioned by original LMDS licensees and endorsed by the Commission – competitive entry into the local exchange and MVPD markets – simply never materialized.[67]

- Warehousing claims involving Advanced Wireless Service (AWS) are at best premature because this spectrum was only auctioned less than one year ago.

In short, no evidence of warehousing is presented on which to base the exclusion of incumbents, and certainly no Commission finding to that effect is mentioned.[68]

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[63] *AT&T Inc. and Bell/South Corporation Application for Transfer of Control*, WC Docket No. 06-74, *Memorandum Opinion and Order*, FCC 06-189 (rel. March 26, 2007), at ¶ 175. *See generally id*. at ¶¶ 175-182. The *Wilkie Paper* also ignores the fact that BellSouth had made substantial use of the 2.5 GHz band spectrum to provide video services under previous rules applicable to that band, but that service was not an economic success.

[64] *Wilkie Paper* at p. 28.

[65] *Id*. at 29.

[66] *See Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services*, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12552 (1997).

[67] *See Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services*, CC Docket No. 92-297, *Third Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 11857, 11863 ¶¶ 14-16 (2000).

[68] *See Cincinnati Bell Telephone Co. v. Federal Communications Comm'n*, 69 F. 3d 752, 760 (6th Cir. 1995) (incumbent eligibility ban on wireless carriers not affirmed because it lacked record support).

2. The actual record of wireless voice and broadband deployment demonstrates that incumbent carriers have strong incentives to aggressively deploy services

While the *Wilkie Paper* on which PISC's warehousing claims are based is thus grounded in a misconception of the facts, neither PISC nor Wilkie even attempt to grapple with the real facts, which demonstrate that wireless operators that are affiliated with existing Internet access service providers have every incentive to build out networks to offer broadband Internet access services, and that they are, in fact, already doing so.

The early history of cellular service build-out demonstrates that affiliates of wireline telephone companies vigorously deployed in-region wireless voice networks – despite the potential for cellular service to compete with the established wireline voice service. Mobile voice service has evolved from a luxury service to a service on which some have come to rely exclusively.

There is a parallel phenomenon occurring in the wireless broadband market. Although the wireless broadband industry is not yet mature, competitive pressures are driving all players to aggressively deploy new services. Wireless broadband is already an important part of the broadband marketplace. Suggestions that incumbent wireless carriers (even those affiliated with wireline DSL providers) will refrain from offering wireless broadband services have no basis in fact. If they were to do so, they would lose the opportunity to offer broadband service to so-called "cord-cutters" and to other potential customers who desire wireless broadband services. Just as cellular carriers who were affiliated with local exchange carriers could not afford to pull punches in an ill-conceived attempt to protect their affiliates' wireline business, today's incumbent wireless carriers cannot afford to stay on the sidelines of the wireless broadband market. To the contrary, incumbent carriers have every incentive – both from a competitive

standpoint and to maximize revenues – to roll out attractive new services, not just in areas where they are affiliated with a DSL providers, but throughout their networks. In fact, they are doing just that.

Wireless carriers have already invested huge sums in order to be able to bring innovative wireless services to the American public. AT&T Mobility's 3G UMTS/HSDPA network now offers service to customers in 165 cities, including 73 of the largest 100 markets.[69] Other wireless carriers likewise are investing huge amounts to expand their capabilities to provide new advanced broadband services, fixed as well as mobile.[70] And all of this new activity has been driven not by any regulatory mandate, but

[69] *See* AT&T Press Release, *Cingular Wireless Reports Fourth Quarter 2006 Results* (Jan. 24, 2007), *available at* http://att.centralcast.net/cingularnewsarchive/Release.aspx?ID=4218.

[70] *See* Verizon Wireless Press Release, *Verizon Wireless Customers in Pittsburgh Get Faster New Wireless Broadband Network* (Mar. 6, 2007) (Verizon Wireless's "existing EV-DO network enables customers to access BroadbandAccess on their laptops, e-mail on their PDAs, and V CAST Video and Music on their wireless phones. The company's national wireless broadband network, the first in the nation, is already available to more than 200 million Americans in 242 major metropolitan areas and 180 major airports from coast to coast."), *available at* http://news.vzw.com/news/2007/03/pr2007-03-06.html; Sprint Press Release, *Investor Quarterly Update – Fourth Quarter 2006 Results* (Feb. 28, 2007) (Sprint's "EVDO coverage . . . today reaches 209 million people and the deployment of Revision A technology . . . currently covers a population of 110 million"), *available at* http://www2.sprint.com/mr/news_dtl.do?id=15540 (s*ee* also *Sprint unveils WiMax plans*, CNET News.com, March 26, 2007, http://news.com.com/Sprint+unveils+ WiMax+plans/2100-1039_3-6170672.html?tag=nefd.top) (Sprint has announced plans to deploy a nationwide WiMax network expected to cover 100 million people in the United States by 2008); T-Mobile Press Release, *T-Mobile USA Exceeds 25 Millions Customer Milestone and Reports Fourth Quarter and 2006 Results* (Mar. 1, 2007) (noting that T-Mobile "has started rolling out its UMTS network and has already deployed 3G equipment on over 1,200 cell sites in the New York metropolitan area"); MetroPCS Communications Inc., Annual Report (SEC Form 10-K – filed Mar. 30, 2007) at 55 (indicating estimate of capital expenditures of $550 million to $650 million to launch new service over Advanced Wireless Service licenses); ALLTEL Corporation, Annual Report (SEC Form 10-K – filed Feb. 20, 2007) (noting Alltel's continuing deployment of 1xRTT data services and its expansion of 1xEV-DO deployments to "provide a broadband wireless environment capable of supporting various leading edge wireless multimedia features and services along with enhanced speed on currently offered applications"). *See also* Sarmad Ali, *New and (Soon) Improved: Fixed WiMax Is here; But It's Mobile WiMax That Has People Even More Excited* , Wall St. J., Nov. 27, 2006, at R8 ("Clearwire is also planning a broad deployment of fixed WiMax . . . [and] Intel has invested $600 million in Clearwire to help deploy mobile WiMax."). Clearwire already offers wireless high-speed Internet access "in 28 metro markets, covering approximately 8.9 million people in more than 400 municipalities." *See* http://phx.corporate-jr.net/phoenix.zhtml?c= 198722&p=irol-homeProfile&t=&id=&. Also, Earthlink has been deploying Wi-Fi networks in cities around the country (*see EarthLink lands largest municipal Wi-Fi network deal*, Atlanta Bus. Chronicle, Apr. 13, 2007, at http://phoenix.bizjournals.com/atlanta/stories/2007/04/09/ daily32.html), and satellite broadband service is available from at least three providers (HughesNet, Starband and WildBlue).

rather by competition among carriers. Put simply, if one carrier does not provide it, others will.

The enormous growth prospects presented by wireless broadband also give wireless carriers strong incentives to develop innovative broadband services, content and applications.[71] Innovative new wireless services now represent an important new potential revenue source which carriers will not ignore. Indeed, carriers need to develop and deploy these new services in order to obtain returns on the massive investments they are making.[72] The 700 MHz spectrum will likely play a crucial role in allowing for expansion of these services.

As the Commission recognized in the *Further NPRM*, demand for wireless broadband services is exploding.[73] As the Commission has recognized, robust head-to-head broadband competition now includes inter-modal providers offering new broadband technologies like Wi-Fi, Wi-Max, mobile wireless, broadband over power line and satellite broadband services.[74] In December 2003, the Commission reported no mobile

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[71] *See* Amol Sharma, *A Look at Mobile Devices and Services You Can Expect in the Next year – and Beyond*, Wall St. J., Mar. 26, 2007, at R1 ("Cellphone operators . . . face slowing subscriber growth as the percentage of consumers who don't own a cellphone shrinks. To boost revenue, they have to find new ways to integrate mobile devices into people's lives. Similarly, handset manufacturers have to convince people who already have phones to buy new ones.").

[72] *See, e.g.*, T. Watts, *et al.*, Cowen and Company, *Mobile Content Delivery – The Next Wave of Wireless Growth* at 6 (June 28, 2006) ("We view the issue as . . . a chicken and egg problem with handset penetration driven by attractive programming. As more and more content becomes available, consumers will likely buy handsets to view it.").

[73] *See Further NPRM* at ¶ 3 (noting the growth in the number of Americans using mobile devices capable of accessing the Internet at broadband speeds, from fewer than 100,000 in June 2000 to over 11 million in June 2006, and citing *High-Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (Jan. 2007) ("*High-Speed Services Report*"), at Table 1).

[74] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, *Report* at 9 (rel. Sept. 9, 2004).

wireless broadband lines in the U.S. By June 2006, however, there were more than 11 million such lines, with roughly 8 million of those added during the first 6 months of 2006 alone.[75]

Carriers are adding high-speed broadband customers at twice the rate associated with more traditional broadband services such as ADSL and cable modem service.[76] The growth in wireless broadband over the past few years has been mirrored by the number of overall providers offering broadband services through high-speed lines. Today there are more than 1,300 broadband providers offering service across the country.[77] In December 1999, the percentage of American Zip Codes in which five or more high-speed service providers reported service was 5.7 percent, but that figure jumped to 35.1 percent by December 2003, and to 63.3 percent by June 2006.[78] More than 76 percent of Zip Codes now have four or more providers.[79]

Given the multiplicity of providers fiercely competing to deliver broadband in a variety of ways, the record supports a market-based auction process – *i.e.*, one that does not exclude any potential bidder – to determine the highest and best of the 700 MHz spectrum.

[75] *See High-Speed Services Report* at Table 1.

[76] Comments of CTIA – The Wireless Association, WT Docket No. 07-71 at 19 (filed May 7, 2007).

[77] *See High-Speed Services Report* at Table 8.

[78] *See id*. at Table 15.

[79] *Id*.

D. Eligibility Restrictions Would Deprive Current Wireless Consumers of Access to Innovative Wireless Services From Their Current Providers

According to CTIA – The Wireless Association®, currently there are more than 236 million subscribers to wireless services in the United States. If the Commission were to exclude incumbent wireless carriers from eligibility for 700 MHz Band licenses, customers would be left without the opportunity to receive from their current provider the fullest array of wireless services.

The 700 MHz Band is likely the last wide swath of spectrum below 1 GHz that will be made available for wireless services in the foreseeable future. It can be used for such services as mobile video, video conferencing and video sharing, and other high bandwidth converged services. As these and other new services are developed and deployed in the 700 MHz Band, it would be contrary to the public interest to deny customers of incumbent wireless carriers the opportunities to receive such services from their current carriers. Massive investments are currently being made in wireless infrastructure with the obvious intention of vigorously competing in the market for new wireless services. Incumbents should not be excluded from the opportunity to use 700 MHz licenses to do so.

IV. THE COMMISSION SHOULD INCORPORATE SOME FORM OF PACKAGE BIDDING INTO THE AUCTION DESIGN, BUT SHOULD NOT WITHHOLD BID INFORMATION BEFORE AND DURING THE 700 MHZ AUCTION

A. Package Bidding Should Be Incorporated into the Design of the 700 MHz Auction

In the *Report and Order*, the Commission determined that no modifications to the existing rules are required in order to implement changes in the way combinatorial, or

"package," bidding is conducted.[80] Though the Commission did not specifically solicit comment on whether a package bidding component should be incorporated into the design of the 700 MHz Auction, AT&T lends its voice to those supporting this notion.[81]

The Commission is statutorily obligated to consider the use of package bidding in certain circumstances.[82] Although the Commission has used package bidding only in connection with an auction of a relatively small number of licenses, it should seriously consider implementing some form of package bidding for the upcoming auction. Doing so will enable bidders to easily assemble desired geographic license combinations in the auction, thereby avoiding the delays and transaction costs involved in post-auction aggregation.

Incorporating package bidding in the 700 MHz Auction will address the so-called "exposure problem" faced by bidders who wish to aggregate a number of licenses into a "package" footprint. In the absence of package bidding, such bidders may only be able to acquire all of the needed licenses at a cost exceeding the value they place on the package of licenses as a whole. For example, a bidder whose business model requires nationwide coverage to achieve adequate scale for new technology and new devices may not be able to participate in the bidding unless package bidding is an option. Such a bidder may have a maximum value that it could pay for the spectrum, but could only make that maximum bid if it can avoid the risk of winning only a subset of its desired licenses. A bidder

[80] *Report and Order* at ¶¶ 67-69.

[81] *See* DIRECTV/EchoStar Comments in WT Docket No. 06-150, Sept. 29, 2006, at 7-8; Motorola Comments in WT Docket No. 06-150, Sept. 29, 2006, at 8.

[82] *See* 47 U.S.C. § 309(j)(3) ("The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round.").

seeking a nationwide footprint in the 700 MHz band may hold provisionally winning bids on nine of the 12 REAG licenses needed for that footprint, but adding the minimum acceptable bid for the remaining three licenses would cause the bidder to exceed its maximum valuation for the package. In such a circumstance, the bidder would be forced either to withdraw its provisionally winning bids, exposing it to potential bid withdrawal payments, or purchase licenses that it does not want.

The Commission can ameliorate this problem for the upcoming 700 MHz Auction. Understanding that, with the number of licenses likely to be offered in the 700 MHz Auction, it may not be feasible to allow each bidder the opportunity to self-select any package of its choice in each round, the Commission can designate pre-selected packages on which it will accept bids. For example, in blocks designated for licensing on an EA basis, bidders should be able to submit package bids for all of the EAs comprising a REAG without introducing too much complexity into the auction. Similarly, bidders should be permitted to submit a nationwide package bid for all licenses in any block. In addition, the Commission should make it possible for a bidder to formulate a package comprised of all the EAs in a REAG and the adjacent-block REAG license. In each case, the Commission can easily compare the package bid with the sum of the bids for the component areas, and bidders can avoid the risk of winning some licenses in the package but not others. Bidders submitting package bids should be credited with auction activity on each license in the package.

B. The FCC Should Not Alter Its Longstanding Policy Favoring the Release of Bidder Information Before and During the Auction

The Commission seeks comment on the potential harms and potential benefits that might flow from using limited information procedures for the upcoming 700 MHz

Auction, and asks commenters to address a number of issues that might bear on the balance of potential harms and benefits.[83] The Commission notes the contention that transparent bidding in FCC Auction No. 66 permitted incumbents to engage in retaliatory bidding, and mentions PISC's assertion that so-called "anonymous bidding" is critical to promoting competitive entry in wireless broadband.[84]

One bedrock policy of the Commission's spectrum auction program is that "parties that value [licenses] most highly . . . are most likely to deploy new technologies and services rapidly, promote the development of competition for the provision of those and other services (including, but not limited to cellular, SMR, paging, and other wireless services), and thus foster economic growth."[85] This policy is grounded in the fundamental and well-settled economic principle that markets operate more efficiently when market participants have equal access to information.[86]

An open information disclosure policy has advanced these goals and served the public interest for almost all of the Commission's auctions. With this information

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[83] *Further NPRM* at ¶¶ 246-249.

[84] *See* Gregory Rose, *How Incumbents Blocked New Entrants in the AWS-1 Auction: Lessions for the Future* and *Tacit Collusion in the AWS-1 Auction: The Signaling Problem* ("Rose Studies"), attached to *Ex Parte* Letter in WT Docket No. 06-150 from Harold Feld, counsel to Media Access Project, to Marlene H. Dortch, Secretary, FCC (filed April 23, 2007) ("MAP *Ex Parte*"); *see also Ex Parte* Comments by PISC in PS Docket No. 06-229 and WT Docket Nos. 06-150, 05-211 and 96-86 (submitted April 3, 2007), at 13.

[85] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994), at para. 70.

[86] The 2001 Nobel Prize in Economics was awarded to George Akerlof, Michael Spence and Joseph Stiglitz for their analyses of markets with asymmetric information. This work was based primarily on Akerlof's ground-breaking 1970 essay *The Market for Lemons*, in which he shows that differences in information either can cause markets to collapse or can lead to "adverse selection" of products. *See also* Urs Schweizer and Thomas von Ungern-Sternberg, *Sealed Bid Auctions and the Search for Better Information*, 50 Economica 79 (1983) (finding that auction sellers gain when the quality of information available to all bidders increases).

disclosure policy, the Commission has assigned thousands of spectrum licenses to bidders who value them most highly.

Since the early days of FCC auctions, the Commission has carefully weighed the costs and benefits of revealing and withholding bidder information before and during an auction, and concluded that the balance fell on the side of disclosure.[87] The Commission concluded that "existing antitrust laws and the FCC's collusion rules should be adequate to prevent collusive conduct."[88]

The benefits of a transparent auction process are well-known. In a process as lengthy and dynamic as spectrum auctions, bidders need to have the ability to absorb and analyze information during the auction in order to make intelligent bidding decisions based on the most current information available. With more information about their bidding rivals, bidders can better refine their auction strategies.[89]

The Rose Studies purport to demonstrate that, in FCC Auction No. 66, incumbent carriers used the fact that bids and bidder identities were disclosed to engage in "tacit collusion" to pursue a "blocking strategy" of targeting potential new entrants and engaging in retaliatory bidding. Dr. Rose does not, however, offer a detailed explanation of the methodology he used to determine whether a particular bid by an incumbent was a "challenging" bid designed to block a new entrant's strategy.

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[87] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994), at paras. 37-42.

[88] *Id*. at ¶ 41.

[89] *See* James Andreoni, Yeon-Koo Che & Jinwoo Kim, *Asymmetric Information about Rivals' Types in Standard Auctions: An Experiment*, Aug. 11, 2006, *accessible at* http://econ.ucsd.edu/~jandreon/WorkingPapers/AuctionACK.pdf ("In a first-price auction with *ex ante* symmetric bidders, knowledge about their rivals causes bidders to refine their bidding strategies based on that knowledge, so any asymmetry in the bidders' knowledge about their rivals leads to an inefficient allocation as well as lower revenue than when the bidders have symmetric information about their rivals").

To be clear, Dr. Rose's allegations of collusion are wholly unsubstantiated – the auction behavior and results he identifies, far from supporting his speculative assertions, describe a highly competitive auction among independent and fiercely competitive bidders. Even if one were to assume his unsubstantiated assertions to be true, the data he cites would indicate that the alleged "tacit collusion" was remarkably unsuccessful. The bidding pattern he describes as "retaliatory bidding" occurred for only a very small percentage of the licenses and was unsuccessful much more often than not. Dr. Rose identified this bidding pattern on only 2.76 percent of the licenses – 12 of the 352 EA licenses, 19 of the 734 CMA licenses, and none of the 36 REAG licenses – and it was *unsuccessful* in 58 percent of those few cases. Dr. Rose was able to point to only 13 out of the 1122 licenses (a mere 1.16 percent) on which he found the alleged bidding practice to have been used successfully.[90] These data simply do not support an inference of collusion, much do they exclude the more likely explanation – competition.[91]

In the absence of any demonstrated need to change the information disclosure policy, anonymous bidding is a solution in search of a problem. In an auction environment with high stakes but little transparency, withholding bidder information will no doubt increase uncertainty for bidders, thereby increasing perceived risk and reducing the desire to bid aggressively. Rather than increasing certainty that licenses will be assigned in the manner most likely to benefit consumers (*i.e.*, by getting service to the public quickly) and enhancing the competitiveness of the auction for the benefit of the

[90] *See* Rose, *Tacit Collusion in the AWS-1 Auction: The Signaling Problem* at 9.

[91] Dr. Rose and Media Access Project similarly speculate that some bidders were "encouraged" to submit upfront payment for Auction 66 simply to affect the modified eligibility ratio and thus facilitate the retaliatory bidding and blocking. They fail to offer any evidence of this whatsoever. *See* MAP *Ex Parte* at 1; Rose, *How Incumbents Blocked New Entrants in the AWS-1 Auction: Lessons for the Future*, at 3-4.

United States Treasury, withholding bidder information may lead to reduced revenues from the auction and encourage speculation by bidders.

V. CONCLUSION

The upcoming auction of licenses in the 700 MHz Band offers the opportunity to unleash the huge potential of this band for the rapid development and deployment of innovative wireless technologies, services and devices. The decisions the Commission stands poised to make in this proceeding will greatly affect the extent to which that potential is realized. AT&T respectfully submits that the best results will follow if the Commission acts in accordance with the above comments.

Respectfully submitted,

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